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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

B270608

Plaintiff and Respondent,

Los Angeles County Super. Ct. No. PA062172

v.

JESSE SILVA,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County, Cynthia L. Ulfig, Judge. Conditionally reversed and remanded with directions.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Shawn McGahey Webb, David E. Madeo and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent. Jesse Silva committed a first-degree murder in 2007. In 2008, when Silva was sixteen years old, he committed another first-degree murder and attempted, with premeditation and deliberation, to commit a third murder. In committing the two murders and the attempted murder, Silva used firearms, and he acted for the benefit of a criminal street gang when he committed the offenses. For the 2008 murder Silva committed when he was sixteen, he received a prison sentence of life without the possibility of parole (LWOP).

This is our fourth opinion in Silva's appeal. Silva contends his LWOP sentence is unconstitutional, and Proposition 57 entitles him to a transfer hearing. Senate Bill (SB) No. 394, passed after Silva filed his notice of appeal, will afford him a parole hearing after 25 years of incarceration, and his constitutional challenges to his LWOP sentence therefore are moot. Because Proposition 57 became effective while Silva's appeal was pending, we conditionally reverse and remand to the juvenile court for a transfer hearing. If the juvenile court concludes Silva's case belonged in juvenile court, the juvenile court shall deem the conviction a juvenile adjudication and impose an appropriate disposition. If the juvenile court concludes Silva's case belonged in adult court, the trial court shall exercise its discretion whether to strike firearm enhancements under SB No. 620.

BACKGROUND

In 2010, a jury convicted Jesse Silva of the first degree murders of Albert Molina in 2007 (count 1) and Johnny Ray Lopez in 2008 (count 3) (Pen. Code, § 187, subd. (a)), each with a

All subsequent statutory references are to the Penal Code unless otherwise indicated.

multiple murder special circumstance and a gang special circumstance (§ 190.2, subd. (a)(3), (22)); and the attempted willful, deliberate, and premeditated murder of Marvin Maldonado in 2008 (count 4) (§§ 664, 187, subd. (a)). The jury found true on each of the above offenses that Silva personally and as a principal used a firearm, intentionally discharged the firearm, and intentionally discharged the firearm causing great bodily injury or death. (Former § 12022.53, subds. (b), (c), (d) & (e)(1).) The jury also convicted Silva of discharge of a firearm with gross negligence (count 2) (§ 246.3, subd. (a)) and assault with a firearm with personal use of a firearm (count 5) (former §§ 245, subd. (a)(2), 12022.5, subds. (a) & (d)). Each of the offenses was committed for the benefit of a criminal street gang (former § 186.22, subd. (b)(1)), and Silva had suffered a prior felony conviction (§ 667, subd. (d)). After resentencing on count 1, Silva's total prison term was LWOP plus 80 years to life.

In 2012, we affirmed Silva's conviction and sentence on appeal. (*People v. Silva* (May 16, 2012, B225127) [nonpub. opn.].) The California Supreme Court granted review and transferred the matter to us for reconsideration in light of *Miller v. Alabama* (2012) 567 U.S. 460. Later in 2012, we vacated Silva's sentence and remanded to the trial court for resentencing. (*People v. Silva* (Dec. 28, 2012, B225127) [nonpub. opn.].) Our Supreme Court again granted review and transferred the matter to us with directions to vacate our decision and reconsider the matter in light of *People v. Gutierrez* (2014) 58 Cal.4th 1354. We vacated the judgment in part and remanded for resentencing on count 3, the court on which Silva received the LWOP sentence, directing the court to exercise the full scope of its discretion under

Gutierrez. (People v. Silva (Nov. 14, 2014, B225127) [nonpub. opn.].)

On February 23, 2016, the trial court conducted a resentencing hearing at which both parties presented evidence, and heard argument from both sides. The court again sentenced Silva to LWOP on count 3, plus a consecutive term of 80 years to life. Silva filed this timely appeal.

DISCUSSION

1. Silva's constitutional challenges to his LWOP sentence are moot

Silva contends the trial court's reimposition of his LWOP sentence is cruel and unusual punishment under the Eighth Amendment, and the trial court incorrectly applied *Montgomery v. Louisiana* (2016) ____ U.S. ___ [136 S.Ct. 718], and its interpretation of *Miller v. Alabama* (2012) 567 U.S. 460. He also contends he was entitled to a presumption favoring a parole-eligible sentence; the trial court did not make the required finding that he was "among the very rarest of juvenile offenders for whom rehabilitation is impossible," and abused its discretion when it reimposed the LWOP sentence; he was entitled to a jury determination whether he was in that group of offenders; and his LWOP sentence is categorically barred by the California Constitution.

While this appeal was pending, the Legislature enacted SB No. 394. The parties filed supplemental briefs. In light of the new law, we conclude Silva's challenges to his LWOP sentence are moot.

SB No. 394 became effective January 1, 2018, amending section 3051 to add subdivision (b)(4), reading as follows:

"A person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions."

The amended statute applies to cases that, like Silva's, were not final when the amendments became effective. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *In re Estrada* (1965) 63 Cal.2d 740, 745.)

The parties agree that Silva is now eligible for a parole suitability hearing during his 25th year of incarceration. (See *People v. Lozano* (2017) 16 Cal.App.5th 1286, 1290.) Silva has had an adequate opportunity (in his 2016 resentencing hearing) to assemble a record of his background, characteristics, and circumstances that will be relevant at a youth parole offender hearing. (See *People v. Franklin* (2016) 63 Cal.4th 261, 277, 283-284.) The statutory amendments, which were not in effect at the time of his resentencing in February 2016, now guarantee him the relief he requests. The amendments are an event that makes it impossible for us, should we decide in Silva's favor, to grant him any effectual relief. (*People v. DeLeon* (2017) 3 Cal.5th 640, 645.)

2. Remand is required for the juvenile court to conduct a transfer hearing

In supplemental briefing, Silva argues Proposition 57 applies retroactively to his case, and we agree.

Silva was charged in adult criminal court under the law then in effect, which permitted the prosecutor to charge the case directly in adult court. In November 2016, long after Silva had been convicted and sentenced in 2010 but while his case remained pending on appeal, the voters passed Proposition 57, which eliminated direct filing and prohibits prosecutors from charging juveniles with crimes directly in adult court. Under Proposition 57, the action must commence in juvenile court; if the prosecution wishes to try the juvenile defendant as an adult, the juvenile court must conduct a transfer hearing. (See Welf. & Inst. Code, § 707, subd. (a).) "Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult." (People v. Superior Court (Lara) (2018) 4 Cal.5th 299, 303 (*Lara*).) In *Lara*, our Supreme Court concluded that Proposition 57 offered defendants the possibility of treatment as a juvenile in juvenile court, and therefore the inference of retroactivity of In re Estrada (1965) 63 Cal.2d 740 allowed the proposition's "'ameliorative changes'" to apply to defendants whose sentences were not yet final. (Lara, at pp. 308-309.) Silva's appeal is pending and his case is not yet final, so he is entitled to the benefits of Proposition 57.

We transfer the matter for further proceedings in the juvenile court.

"'When conducting the transfer hearing, the juvenile court shall, to the extent possible, treat the matter as though the prosecutor had

originally filed a juvenile petition in juvenile court and had then moved to transfer [the defendant's cause to a court of criminal jurisdiction. ([Welf. & Inst. Code] § 707, subd. (a)(1).) If, after conducting the juvenile transfer hearing, the court determines that it would have transferred [the defendant] to a court of criminal jurisdiction because he is "not a fit and proper subject to be dealt with under the juvenile court law," then [the defendant's] convictions and sentence are to be reinstated. ([Welf. & Inst. Code] § 707.1, subd. (a).) On the other hand, if the juvenile court finds that it would *not* have transferred [the defendant] to a court of criminal jurisdiction, then it shall treat [the defendant's] convictions as juvenile adjudications and impose an appropriate "disposition" within its discretion."

(*Lara*, *supra*, 4 Cal.5th at p. 310 (quoting *People v. Vela* (2017) 11 Cal.App.5th 68, 82).)

3. If the juvenile court concludes Silva's case belonged in adult criminal court, the adult court shall exercise its discretion under SB No. 620

The trial court imposed a 25-year sentence for the section 12022.53, subdivision (d) firearm enhancement on count 1. The court stayed punishment for firearm enhancements under section 12022.53, subdivisions (b) and (c) on count 1, under section 12022.53, subdivisions (b), (c), and (d) on count 3, under section 12022.53, subdivisions (c) and (d) on count 4, and under section 12022.5, subdivisions (a) and (d) on count 5. We

requested, and received, supplemental letter briefs on the effect of SB No. 620's amendment of sections 12022.5, subdivision (c), and 12022.53, subdivision (h), effective January 1, 2018. We agree with Silva that, as a defendant whose sentence is not yet final on appeal, he is entitled to the trial court's exercise of its newfound discretion whether to strike the firearm enhancements. In sentencing Silva, "the trial court gave no indication whether it would exercise discretion to strike the firearm enhancement . . . if it had such discretion." (People v. Billingsley (2018) 22 Cal.App.5th 1076, 1081.) "[S] peculation about what a trial court might do on remand is not 'clearly indicated' by considering only the original sentence." (People v. Almanza (2018) 24 Cal. App. 5th 1104, 1110-1111.) If the juvenile court determines that Silva's case properly belonged in adult court, the juvenile court shall transfer the case to the trial court for that court to exercise its independent discretion under SB No. 620.

DISPOSITION

The judgment is conditionally reversed and the matter is remanded to juvenile court with the following directions. No later than 90 days from the filing of the remittitur, the juvenile court is directed to conduct a transfer hearing pursuant to Welfare and Institutions Code section 707, subdivision (a).

If, at the transfer hearing, the juvenile court determines it would have transferred Jesse Silva's matter to the adult court, then the juvenile court shall transfer the case to the trial court for that court to exercise its independent discretion under Senate Bill No. 620.

If, at the transfer hearing, the court determines it would not have transferred Silva's matter to the adult court, Silva's criminal conviction shall be deemed a juvenile adjudication as of that date. The juvenile court shall conduct a dispositional hearing within its usual timeframe and impose an appropriate disposition within its discretion under juvenile law.

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	EGERTON, J.
We concur:	

EDMON, P. J.

LAVIN, J.